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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JULIO VALENZUELA, Defendant and Appellant.	G034725 (Super. Ct. No. 03NF2425) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed as modified.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela A. Ratner Sobeck and Ivy B. Fitzpatrick, Deputy Attorneys General, for Plaintiff and Respondent.

Julio Valenzuela was convicted of robbery, assault with a firearm and shooting at an occupied vehicle. The jury also found he used and was armed with a firearm, but it rejected the allegation he personally discharged one. Valenzuela contends the court erred by failing to instruct on lesser included offenses and failing to strike the gun use enhancement. His second point is undisputed and well taken. However, other than correcting this minor sentencing error, we affirm the judgment in its entirety.[1]

* * *

One night after playing music at an Anaheim restaurant, Miguel Ramirez walked to his car in the parking lot. As he entered the vehicle and started it up, a van pulled up from behind, preventing his departure. Accounts differ as to what happened after that. Ramirez testified two men exited the van and approached his car, one on each side. Both of the men had guns and aimed them at him. The man on his side demanded his wallet, but thinking the guns weren't real, Ramirez told him he didn't have any money. However, after the other man yelled "I told you[,] shoot at him and let's go," Ramirez surrendered his wallet out of fear. The two men then ran back to the van, at which point Ramirez noticed a third man sitting in the van's driver's seat.

As the van left the parking lot, Ramirez followed it onto the freeway. However, he quit his pursuit after one of the men leaned out of the passenger side of the van and fired several shots at him. Ramirez later found two bullet holes in the front of his car when he checked it for damage.

During trial, Ramirez identified Valenzuela as the man who took his wallet. However, he admitted he wasn't sure because Valenzuela and the driver looked a lot alike. In fact, at one point in his testimony he said, "I hope I don't make a mistake, but I think [Valenzuela] was the one who was behind the wheel in the van."

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[1] In his briefs, Valenzuela also challenged the court's instruction on the personal use allegation, but he withdrew this claim after the record on appeal was augmented with proof of the instruction's propriety.

During a pretrial photo lineup, Ramirez identified Valenzuela as having approached his car, but he identified Albert Rivas as the one who took his wallet. He also said Rivas was the shooter. He identified Hector Erivas as being involved in the robbery, but he could not say what his role was.

Rivas testified as part of a plea agreement. He said he was the driver, and after he boxed in Ramirez's car, Erivas and Valenzuela approached it with guns. Valenzuela was on the passenger side initially, but when Ramirez was unresponsive to Erivas' threats, he ran over to the driver's side and brandished his weapon. Ramirez responded by throwing his wallet toward Valenzuela. When they returned to the van, Valenzuela got in the passenger seat and Erivas jumped in the back.

Rivas had given a different story to the police. He said two other men (who he claimed not to know) were also in the van, and they were the ones who thought of and committed the robbery. However, when the police told Rivas he had been implicated as the shooter, he changed his story, adopting the version he presented at trial.

Testifying for the defense, Erivas also said there were two unidentified men in the van. One of them had a gun and said he wanted to use it. He directed Rivas to stop the van, and then he got out and approached Ramirez alone. When he returned to the van, he yelled, "Let's go." He never showed Erivas a wallet or went back to pick anything up. According to Erivas, he was also the one who fired at Ramirez on the freeway.

Shortly before trial, though, Erivas told investigators that while there were two unidentified men in the van, he and Valenzuela were the ones who committed the robbery. He said Valenzuela went to the driver's side and talked to Ramirez, but he couldn't hear what they were saying. The next thing he knew, Valenzuela ran back to the van and someone yelled, "The wallet." Erivas saw the wallet on the ground, grabbed it and threw it toward Valenzuela. Once they were inside the van, Valenzuela looked in the wallet and wailed, "All that shit for three dollars."

I

Valenzuela contends the trial court should have instructed the jury on attempted robbery and theft as lesser included crimes of robbery, and brandishing a gun and assault as lesser included crimes of assault with a firearm. Although both parties requested these instructions, we agree with the trial court that there was not substantial evidence to support them.

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support. . . . [¶] . . . [T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Relying on Erivas' pretrial statement that he saw the wallet on the ground, and on Erivas' testimony that he did not see the wallet in the van, Valenzuela claims the jury could have concluded the robbers did not get away with any of Ramirez's property, and therefore the court should have instructed on attempted robbery as a lesser included offense of robbery. Asporting or carrying away the loot is a necessary element of robbery. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165.) However, "for purposes of establishing guilt, the asportation requirement is initially *satisfied* by evidence of slight movement . . . ." (*Ibid.*) Accordingly, it does not matter whether the robbers dropped Valenzuela's wallet or Erivas ever saw it. The key point is that Valenzuela surrendered his wallet to the robbers in response to their demands. This asportation of the wallet,

however slight, was sufficient to elevate the crime from attempted robbery to robbery. Therefore, instructions on attempted robbery were not required.

Nor was the court required to instruct on theft as a lesser included offense of robbery. Valenzuela claims the evidence suggests Ramirez was not afraid of the robbers because he initially thought their guns were fake, and he followed them in his car after they took his wallet. However, Ramirez quickly realized the guns were real after one of the robbers said something about shooting him. And, since Ramirez turned over his wallet out of fear and in response to the robbers' show of force, it doesn't matter whether he followed the robbers later on. Whatever he was thinking then, it would not negate the fact *the taking* was accomplished by force or fear, which is what the robbery statute requires. (Pen. Code, § 211.)

Valenzuela also claims instructions on theft were warranted because the evidence indicated the robbers intended to assault Ramirez, and merely took his money as an afterthought. But the evidence was undisputed that the robbers demanded Ramirez's money when they first approached him, and there was no evidence to provide a motive for an assault not connected to robbery, so it seems readily apparent what was on their mind. Although there was some evidence the wallet was on the ground at one point, this does not, as Valenzuela contends, constitute substantial evidence the robbers formed the intent to steal after the initial taking. It merely shows the robbers had trouble carrying away their booty.

In arguing lack of intent to rob, Valenzuela also notes there was evidence one of the unidentified men had a gun and said he wanted to use it. Valenzuela takes this to mean the man wanted to use the gun for something other than robbery. But this is sheer speculation, and all the evidence points to the opposite conclusion, i.e., that the gunman wanted to use his weapon *to pull off a robbery*. Under these circumstances, the court was not required to instruct on theft as a lesser included offense of robbery.

As for the charge of assault with a firearm, Valenzuela contends the court should have instructed on the lesser included offenses of simple assault and brandishing a firearm because although the robbers used guns to obtain Ramirez's money, it was not reasonably foreseeable that one of them would actually go so far as to shoot at Ramirez. (See *People v. Woods* (1992) 8 Cal.App.4th 1570, 1593 [in aiding and abetting context, court must instruct on lesser included offenses if charged offense is not a reasonably foreseeable consequence of target offense].) We disagree.

"The determination whether a particular criminal act was a natural and probable consequence of another criminal act aided and abetted by a defendant requires application of an objective rather than subjective test. [Citations.] [T]he issue . . . depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. [Citations.]" (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.)

Despite conflicting accounts of how the robbery occurred, it is undisputed the robbers were carrying loaded guns and aimed their weapons at Ramirez during the robbery. It also appears the robbers contemplated using their weapons beforehand. While driving around prior to the robbery, one of them said he wanted to use his gun. And once the robbery got under way, one of them yelled out, "I told you[,] shoot at him and let's go." This was precisely when the robbers were trying to obtain Ramirez's wallet, so the situation was fraught with the danger of gun violence. Although the robbers did not shoot at this point, they did moments later on the freeway, while they were making their escape and the robbery was still in progress. (See *People v. Cooper, supra,* 53 Cal.3d at pp. 1164-1170 [for aiding and abetting purposes, the crime of robbery continues until the robbers reach a place of temporary safety].)

On these facts, we cannot say assault with a firearm was an inevitable consequence of the robbery. But it was certainly reasonably foreseeable. When gun-

toting robbers confront an unsuspecting victim in the dead of night, it is hardly surprising when gunfire erupts and the victim becomes a target, especially when, as here, the victim offers some form of resistance. Indeed, the law is replete with examples where gun use was determined to be a reasonably foreseeable consequence of armed robbery. (See *People v. Bradley* (2003) 111 Cal.App.4th 765 [appellant convicted of attempted murder under natural and probable consequences doctrine where his accomplice shot recalcitrant victim during hold-up]; *People v. Nguyen* (1988) 204 Cal.App.3d 181 [appellant convicted of assault with a deadly under natural and probable consequences doctrine where his accomplice threatened victim with a gun during robbery getaway]; *People v. Hammond* (1986) 181 Cal.App.3d 463 [attempted murder was a natural and probable consequence of armed robbery]; *People v. Rogers* (1985) 172 Cal.App.3d 502 [same]; *People v. George* (1968) 259 Cal.App.2d 424 [assault during escape was a natural and probable consequence of robbery].)

Viewed objectively, the facts surrounding the robbery were so conducive to the commission of a firearm assault that the trial court was not required to instruct on any lesser included offenses. No instructional error has been shown.

II

At sentencing, the trial court stayed Valenzuela's one-year enhancement for being armed with a firearm. (Pen. Code, § 12022, subd. (a)(1).) However, as the Attorney General concedes, the court should have stricken this enhancement altogether because it imposed a 10-year enhancement for Valenzuela's use of a firearm. (Pen. Code, § 12022.53, subd. (b), (f).) We will modify the judgment accordingly.

DISPOSITION

The judgment is modified to strike Valenzuela's one-year enhancement under Penal Code section 12022, subdivision (a)(1). In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O’LEARY, J.

MOORE, J.